Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

WILLIAM G. MOORE, JR.,

Petitioner,

v.

JOSEPH B. VALDER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent is a federal prosecutor. He is charged, among other things, with intimidating and otherwise manipulating a grand jury witness into falsely incriminating petitioner in retaliation for petitioner's public criticism of the United States Postal Service. As a result of this misconduct, petitioner was indicted and subjected to a baseless but nevertheless personally devastating trial. In 1995, a panel of the United States Court of Appeals for the District of Columbia Circuit held that respondent's intimidation and manipulation of the grand jury witness was investigatory, not advocatory, misconduct. On remand, respondent renewed his absolute immunity claim but styled it as a motion for summary judgment and without permitting any discovery, the district court granted the motion. On appeal, a second panel of the D.C. Circuit affirmed, ruling that absolute immunity bars petitioner's claim for retaliatory prosecution even though that claim is based upon investigatory misconduct. As a consequence, the question presented here is:

> Whether respondent is entitled to absolute immunity against claims for retaliatory prosecution that are based upon investigatory misconduct.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioner William G. Moore, Jr., the appellant below; respondent Joseph B. Valder, an appellee below; and the United States of America, another appellee below.

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PETITION FOR A WRIT OF CERTIORARI

William G. Moore, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit that is the subject of this petition (App. 1a-14a) is reported at 213 F.3d 705. The order and memorandum opinion of the United States District Court for the District of Columbia from which that appeal was taken (App. 30a-77a) is unreported. The district court's memorandum opinion denying reconsideration (App. 15a-29a) is also unreported. An opinion from a prior appeal, (App. 78a-93a) is reported at 65 F.3d 189, and the district court decisions from which that appeal was taken are reprinted in the appendix to respondent's petition for certiorari, which this Court denied. *See* 519 U.S. 820 (1996).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the District of Columbia Circuit was issued on June 2, 2000. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of 42 U.S.C. § 1983 is reprinted in its entirety at App. 126a.

STATEMENT

As this Court has recognized, when public officials are sued, courts must strike a delicate "balance between the evils

inevitable in any available alternative." *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). Although suits against public officials impose costs upon public officials and can interfere with the discharge of their public duties, such suits also benefit the public by compensating victims of official misconduct, deterring abuses of office, and demonstrating that all public officials are subject to the law. This Court has therefore afforded public officials immunity based not upon the positions that they hold, but upon the public's interest in the functions they perform. In addition, while this Court has held that all public officials performing discretionary functions enjoy qualified immunity, *see id.* at 818, it has been "quite sparing in its recognition of claims to absolute immunity" and has refused to extend such immunity further than necessary to protect the conduct of public business. *Forrester v. White*, 484 U.S. 219, 224 (1988); *see Butz v. Economou*, 438 U.S. 478, 507 (1978).

Accordingly, this Court has repeatedly held that prosecutors enjoy absolute immunity while performing "advocatory" functions intimately related to the judicial process, but only qualified immunity while performing "investigatory" functions. *See Kalina v. Fletcher*, 522 U.S. 118 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Burns v. Reed*, 500 U.S. 479 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The decision below ignores these decisions and the overall framework that this Court has established for official immunity questions. Although the court of appeals recognized that petitioner's retaliatory prosecution claim against respondent was based upon investigatory conduct, it nonetheless held respondent absolutely immune from that claim due to his status as a prosecutor. App. 7a-8a. This decision ignores the principles underlying this Court's immunity decisions. Indeed, the decision below adopts the very position that this Court rejected seven years ago in *Buckley v. Fitzsimmons*. As a consequence, that decision casts doubt upon the willingness of

the court of appeals in the circuit in which the federal government sits to recognize the limitations this Court has imposed upon official immunity and to entertain meritorious claims against federal officials.

A. The Petitioner's Retaliatory Prosecution Claim.

In the mid-1980s, petitioner William G. Moore, Jr., became embroiled in a public dispute with the United States Postal Service (USPS) over automation technology. In the course of this dispute, petitioner publicly criticized the USPS, lobbied Congress, and fueled a controversy that resulted in the dismissal of high-ranking USPS officials. Although the Postal Service eventually adopted the technology advocated by petitioner, thereby saving the public millions of dollars a day, it offered him no thanks. Instead, in an abuse of government power that has formed the basis for significant inquiries by the press, *see, e.g.*, McGee, *Grand Jury Shielded from the Facts: A Defendant's Nightmare*, The Washington Post, Jan. 12, 1993 at A1 (J.A. 876-82), respondent, an Assistant United States Attorney, and the postal inspectors under his supervision conducted a vindictive criminal investigation culminating in an unwarranted indictment that destroyed petitioner's company and his career.

1. *The Scanner Controversy*—In the early 1980s, petitioner was a successful businessman in the high tech field. In 1982, he became the chief executive officer of Recognition Equipment, Inc. ("REI"), a foundering company laden with out-moded products and debt. J.A. 811-12. Within a year, however, petitioner was able to make REI profitable again, simultaneously jettisoning unprofitable lines and building company morale, and he was honored as the Dallas/Ft. Worth Businessman of the Year, elected chairman of the American Electronics Association, and named to the Board of Regents at Georgetown University. J.A. 812-14, 830.

Although REI had, with the aid of USPS research funds, developed multi-line optical character readers able to sort mail down to the carrier level, J.A. 816, petitioner initially considered disbanding the company's postal engineering group because the company had strained relations with the Postal Service and had never received a production contract from it. J.A. 137, 544, 815-17. Petitioner decided, however, to retain the group at the urging of Postmaster General Bolger and other high-level USPS officials in 1982. J.A. 815-16. When Bolger announced a year later that the Postal Service would purchase only single-line scanners, petitioner complained that this decision was unsound and that he had been misled. J.A. 816-17. Relations with the Postal Service became acrimonious. Bolger told petitioner to "back off," and another high-ranking official said REI would never receive a production award if he had anything to do with it. J.A. 816-17.

Petitioner did not, however, back off. Instead, he went public, launching a media campaign, lobbying Congress, and attacking the USPS decision to rely upon single-line technology in public hearings before congressional committees. J.A. 546, 817, 831-36. As a result of this effort, the Postal Service's adoption of single-line scanners became a "subject of significant public debate involving executive studies, legislative inquiries, and broad media exposure." App. 100a. Eventually, the better technology prevailed, and the Postal Service adopted multi-line scanners. App. 118a.; *see also* Office of Technical Assessment, *Review of Postal Automation Strategy* 2 (June 1984) (discussing the technological superiority of multi-line scanners) Moreover, as a result of this decision, high-ranking USPS officials, including Bolger's successor as postmaster general, Paul Carlin, were removed. App. 117a-19a.

2. *The Investigation*—Although petitioner's company was the only American producer of multi-line scanners suitable for use by the Postal Service, REI never received a production

contract from the USPS. Instead, petitioner and his company were ruined by an unwarranted criminal investigation that ended in their indictment and trial.

The investigation arose out of petitioner's retention of a consulting firm at the suggestion of Peter Voss, a member of the Postal Service Board of Governors. App. 99a. Although the consulting firm was conversant with optical scanning technology, had excellent political contacts, and represented major clients, it also had a darker side: unbeknownst to petitioner, it was involved in a kickback scheme with Voss. App. 99a, 103a-05a.

Though the conspirators entered into plea or immunity agreements with the Government, respondent and the postal inspectors were unable to uncover any evidence showing that petitioner even knew of the kickback scheme. App. 35a, 112a-13a. Quite the contrary, each of the conspirators denied that petitioner and his company had any knowledge of the scheme. App. 112a. At this point, respondent, as the prosecutor supervising the investigation, should have reined in the postal inspectors and terminated the investigation. Instead, he joined in the Postal Service's vendetta against petitioner and persuaded a grand jury to indict petitioner by departing from the high standards normally observed by federal law enforcement personnel and engaging in a shocking pattern of misconduct.[1]

The Witness Statements—When witnesses appear before a grand jury, they normally answer questions posed to them.

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[1] Respondent explained one of his incentives to grand jury witness William Hittinger, a former REI director and former president of Lehigh University: "the merits of the case [against petitioner] or whether the persons involved were guilty or not did not concern him"; respondent wanted to prosecute petitioner successfully "to get a track record or some notoriety which would help him obtain a good position in private practice." J.A. 732.

When the participants in the kickback scheme appeared before the grand jury, however, respondent did not permit them to testify directly to the grand jury and possibly repeat that petitioner was unaware of the scheme. Instead, respondent and the postal inspectors under his supervision wrote "witness statements" that omitted key exculpatory evidence and recounted selected facts in an incriminating fashion, and these statements were read by respondent to the grand jury while the "witnesses" sat in the witness chair before the grand jury. App. 2a, J.A. 440, 582-86.

When one witness objected to the statement written for him, respondent and the postal inspectors refused to revise it. J.A. 553-59. Morever, after the witness was induced to sign the statement on the condition that he be permitted to tell the grand jury that petitioner did not know about the kickbacks, respondent reneged on the deal and did not permit the witness to give testimony exculpating petitioner before to grand jury. J.A. 560-61.

The Spinning of William Spartin—When one of the conspirators, William Spartin, was first interviewed, he offered no evidence suggesting that petitioner was aware of the kickback scheme. J.A. 609-10, 613, 669. Six months later, respondent and the postal inspectors lowered the boom. With ten or so postal inspectors surrounding Spartin, who suffered from a heart condition and was under psychiatric care, respondent accused Spartin of lying and literally tore up his immunity agreement in a premeditated intimidation tactic. J.A. 440, 601-04, 801. Respondent also threatened to subpoena and prosecute Spartin's son if Spartin refused to play ball. J.A. 644. Respondent then shifted gears and (in violation of grand jury secrecy rules) showed Spartin the grand jury witness statements that had been scripted for his co-conspirators. J.A. 607-26, 801.

Despite this pressure, Spartin continued to maintain that he had no knowledge that petitioner was aware of the kickback

scheme. Indeed, during a polygraph examination that he passed, Spartin repeated this key point nineteen times. App 36a; J.A. 609-43. Spartin wanted, however, to help. At one point during his polygraph examination, he said, "It's so bad. I want to help, I just don't know how, that's the problem." J.A. 642. Ultimately, he was able to do so by offering an opinion based upon the grand jury witness statements shown to him that REI knew about the kickback payments:

> Being paid, no sir, I don't. I have no knowledge of that at all. . . But, you know, *I read that goddam testimony and I'm not a lawyer but Jesus, there's enough there to seem to me to hang REI from the yardarm*.

J.A. 621(emphasis added). Spartin later repeated this opinion to the grand jury, but without the caveats about his lack of personal knowledge. J.A. 453.

Other Misconduct—In addition to coercing Spartin and misleading the grand jury, respondent engaged in other misconduct, including failing to disclose Spartin's highly exculpatory polygraph examination at trial. J.A. 666-92. Most tellingly, respondent and the postal inspectors also disclosed confidential witness statements and lab test results to Paul Carlin, the former Postmaster General who lost his job in part due to petitioner's activities. App. 3a, 38a. Postal inspectors also shared a draft indictment with Carlin, who later filed a multi-million dollar claim against petitioner. App. 3a.

B. The Criminal Trial.

Petitioner was indicted, along with REI and another company executive, in October 1988. App. 3a. Once trial began, however, the case built by respondent and the postal inspectors collapsed like a house of cards. After respondent presented the Government's case for six weeks, the district court granted petitioner's motion to acquit, concluding that the Government had failed to establish a prima facie case of

petitioner's awareness of the kickback scheme. App. 3a; 94a-126a.

Despite this acquittal, the trial was a catastrophe for petitioner and his company. As respondent and the postal inspectors contemplated, the indictment forced REI's debarment from government contracting, and the key contracts for the USPS's giant procurement of multi-line scanners were awarded to a competitor. As a result, REI's stock plummeted, there was a hostile takeover, and petitioner lost his job. J.A. 819-20, 823-29. Even worse, due to his indictment, petitioner found that he was no longer considered a viable candidate for high-level positions at publicly-traded companies. J.A. 819-20.[2]

C. Petitioner's Claims.

In November 1991, petitioner sued respondent and the postal inspectors in the Northern District of Texas for, among other things, prosecuting him in retaliation for exercising his First Amendment rights to criticize the Government and to petition Congress. J.A. 68-93. After the claims against respondent were dismissed on grounds of absolute immunity, the case was transferred to the District of Columbia along with a separate complaint against the Government under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* App. 79a-80a. Although the postal inspector's initial motion to dismiss had been denied by the Texas court, the D.C. district court (Johnson, J.) allowed a second motion and dismissed petitioner's remaining claims. App. 80a-81a.

The Initial Appeal — On appeal, the D.C. Circuit reinstated several of petitioner's claims against respondent, including a

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[2] By contrast, respondent suffered no repercussions from his misconduct. Although a complaint was filed by Robert S. Bennett, Charles A. Stillman, and other defense attorneys with the Department of Justice, no disciplinary action was ever taken against him. J.A. 648-53, 773-74.

retaliatory prosecution claim. Although the court of appeals held respondent absolutely immune from claims based upon some conduct, it found that absolute immunity did not bar claims based upon the coercion of William Spartin and the unauthorized disclosure of grand jury testimony. App. 86a-88a. "Intimidating and coercing witnesses into changing their testimony," the court reasoned, "is not advocatory." App. 86a-87a. Such misconduct is instead a "misuse of *investigative* techniques" used to gather information that might be used in a prosecution, a "typical police function." App. 87a. The court of appeals also found that the unauthorized disclosure of grand jury materials is not protected by absolute immunity because it "has no functional tie to the judicial process." App. 87a-88a.

In addition, the D.C. Circuit reinstated some of petitioner's claims against the postal inspectors and against the Government. Specifically, the court held that the postal inspectors' alleged procurement of petitioner's prosecution in retaliation for the exercise of his First Amendment rights violated a clearly established constitutional right and that petitioner's retaliatory prosecution claim was therefore not barred by qualified immunity. App. 90a. The court also reinstated petitioner's claim against the Government based upon the unauthorized disclosure of grand jury testimony. App. 92a-93a.

Though his separately retained counsel, respondent filed a petition for certiorari, which this Court denied. *See* 519 U.S. 820 (1996).

The Remand—On remand, respondent and the other defendants initially acknowledged that the case should proceed into discovery. The district court, however, suspended discovery *sua sponte* in light of *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996) (en banc), *rev'd*, 523 U.S. 574 (1998), and entertained motions from respondent and the postal inspectors for summary judgment based upon that decision. Although, as petitioner urged in an *amicus* brief, this

Court vacated the D.C. Circuit's decision in *Crawford-El*, *see* 523 U.S. at 601, the district court nonetheless dismissed the claim against respondent based upon an absolute immunity argument respondent had raised unsuccessfully in the prior appeal. App. 52a-56a. In the district court's view, absolute immunity barred petitioner's retaliatory prosecution claim because it necessarily rested on respondent's decision to prosecute. App. 53a-54a. In so ruling, the district court denied petitioner's Rule 56(f) affidavit requesting that summary judgment be deferred until after discovery. The district court also dismissed petitioner's claims against the Government. App. 62a-76a. [3]

The Decision Below—On appeal, a new panel reinstated petitioner's malicious prosecution claim against the Government. It found that petitioner had stated a valid claim by alleging that his prosecution was procured by the unauthorized disclosure of grand jury testimony to Sparting which in turn led Spartin to incriminate petitioner before the grand jury and the grand jury in turn to indict. App. 12a. The panel also, however, affirmed the dismissal of petitioner's retaliatory prosecution claim against respondent based upon absolute immunity. App. 8a.

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[3] The district court denied the postal inspectors' motion for summary judgment because it found that, even prior to discovery, petitioner had presented sufficient evidence of a retaliatory motive to survive summary judgment. App. 61a-62a. Subsequent discovery has uncovered several "smoking guns" confirming this inference. For example, one document apparently prepared by the postal inspectors and circulated to respondent lists REI's "fund[ing] a media and political campaign to discredit USPS management and cause financial harm to USPS" as the first reason for indicting the company. App. 127a-30a. Another document entitled "Details of the Offense" faults petitioner for his efforts to "undermine the [USPS] competitive testing program via the media and Congress." App. 131a-33a.

The panel held that respondent was absolutely immune from petitioner's retaliatory prosecution claim because he was a prosecutor. While acknowledging that this Court has "extended only qualified immunity to prosecutors acting in an investigatory fashion," the panel nevertheless declared that a prosecutor "could not be held liable for causing a prosecution to be brought." App. 7a (quotation omitted). In response to petitioner's protest that this ruling ignores the distinction between advocatory and investigatory conduct, the lower court simply noted "there are potential causes of action against prosecutors that do not rely on the decision to prosecute" such as a "violation of the Fourth Amendment." App. 7a-8a; *see also* App. 8a n.3 (rejecting petitioner's request for discovery).

REASONS FOR GRANTING THE WRIT

Though terse, the decision below contains an all-out rebellion against this Court's official immunity decisions. Indeed, the rationale adopted below manages simultaneously to reject the functional approach this Court has applied to official immunity claims in general, ignore the specific restrictions this Court has imposed on the use of absolute immunity, and disregard this Court's instructions in *Crawford-El v. Britton*, 523 U.S. 574 (1998), on imposing new barriers to recovery in civil rights cases and on the availability of discovery in such suits. Moreover, the decision below also adopts the very position that this Court rejected in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). As a consequence, this decision not only casts doubt upon the willingness of the court of appeals in the nation's capital to consider meritorious claims against federal officials; it also directly challenges the authority of this Court. Because of the evident importance of these issues, this case merits the attention of this Court.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *BUCKLEY*.

The decision below casually dismissed this Court's prosecutorial immunity decisions with the suggestion that they concerned "potential causes of action against prosecutors that do not rely upon the decision to prosecute." App. 7a-8a. In fact, this Court has refused to formulate special immunity rules based upon the nature of the claim before it. *See, e.g.*, *Crawford-El*, 523 U.S. at 593; *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). Even more importantly, in *Buckley v. Fitzsimmons*, this Court rejected the very position adopted by the decision below.

Much like petitioner, the plaintiff in *Buckley* brought malicious prosecution and related constitutional claims against prosecutors based upon the prosecutors' alleged fabrication of evidence. The plaintiff claimed that, in order to obtain his indictment for a highly publicized murder, the prosecutors retained an anthropologist "well known for her willingness to fabricate unreliable expert testimony." 509 U.S. at 262. Although law enforcement experts were unable to make a reliable connection between the plaintiff and a bootprint found at the victim's house, the anthropologist made a positive identification of plaintiff based upon the bootprint both before the grand jury and at a subsequent criminal trial. *See id.* at 262-64. Nonetheless, the jury was unable to reach a verdict, and after the anthropologist passed away and the charges were dropped, the plaintiff sued. *See id.* at 261-62, 264; *Buckley v. County of DuPage*, No. 88 C 1939, 1989 WL 64321, at *1 (N.D. Ill. June 9, 1989).

On appeal, the Seventh Circuit held that the prosecutors were absolutely immune from claims based upon the alleged fabrication of the bootprint evidence. *See Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1991). The court reasoned that the prosecutors enjoyed absolutely immune because the injury alleged in those claims "flows from the

initiation or prosecution of the case." 919 F.2d at 1233, 1240-41. After this Court held that absolute immunity does not protect investigatory conduct by prosecutors, *see Burns v. Reed*, 500 U.S. 478 (1991), the Seventh Circuit's initial decision was vacated. *See Buckley v. Fitzsimmons*, 502 U.S. 801 (1991). On remand, the Seventh Circuit reaffirmed its prior ruling that the prosecutors were protected by absolute immunity against claims for malicious prosecution whether or not those claims are based upon investigatory conduct. *See Buckley v. Fitzsimmons*, 952 F.2d 965, 966-67 (7th Cir. 1992) (per curiam). Prosecutors, the court of appeals held, are entitled to absolute immunity against claims based upon such conduct unless "the act of gathering and evaluating evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment)." *Id.* at 967.

This Court reversed, rejecting the Seventh Circuit's "unprecedented theory" that the prosecutors enjoyed absolute immunity because "the injuries suffered by [Buckley] occurred during criminal proceedings." *Buckley*, 509 U.S. at 265, 271-72. Under this Court's immunity decisions, the focus is "on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Id.* at 271. As a consequence, while the location of a plaintiff's injury may be relevant in determining whether that plaintiff has stated a valid claim, it is "irrelevant . . . to the question whether the conduct of a prosecutor is protected by absolute immunity." *Id.* at 272. Finding that the alleged fabrication of the bootprint was investigatory in nature, this Court held that the prosecutors were not protected by absolute immunity. *See id.* at 272-76.

As Justice Kennedy recognized, this ruling permits prosecutors to be sued for malicious prosecution claims if those claims are based upon investigatory conduct. Under this Court's decision in *Buckley*, Justice Kennedy observed, "no

longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the prosecutor prior to the initiation of prosecution." *Buckley*, 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). Thus, even though malicious prosecution is in many ways the "classic case for the invocation of absolute immunity," under this Court's decision in *Buckley*, a malicious prosecution claim based upon investigatory misconduct "falls on the unprotected side of the Court's new dividing line." *Id.*

The decision below cannot be reconciled with *Buckley* and, in fact, adopts a theory that is functionally equivalent to the "unprecedented theory" rejected in that decision. According to the decision below, a prosecutor may not "be held liable for causing a prosecution to be brought." App. 7a (quotation omitted). Under the Seventh Circuit "unprecedented theory," prosecutors are absolutely immune from all claims based upon injuries flowing from prosecution. An individual cannot, however, be held liable for the injury flowing from a prosecution unless that individual also proximately caused the prosecution, *see, e.g.*, *Restatement (Second) of Torts* § 653 (1979); *see also Martinez v. California*, 444 U.S. 277, 284-85 (1980) (applying the proximate cause requirement to constitutional torts), and conduct causing a prosecution to be brought causes the injuries flowing from that prosecution. As a consequence, the Seventh Circuit's location-of-injury theory and the causation theory adopted below are simply two sides of the same coin—which is no doubt why both the Seventh Circuit and the decision below relegated the distinction between advocatory and investigatory conduct to tort claims that are completely independent of prosecution. *Compare* App. 7a-8a *with Buckley*, 952 F.2d at 967.

II. THE DECISION BELOW DISREGARDS THE PRINCIPLES OF OFFICIAL IMMUNITY FORMULATED BY THIS COURT.

In addition to contradicting the specific holding in *Buckley*, the decision below also conflicts more generally with this Court's opinions on official immunity. Indeed, the decision below ignores the basic approach that this Court has taken toward official immunity, the specific restrictions that this Court has imposed upon absolute immunity, and this Court's instructions on discovery in *Crawford-El*. In short, the decision below is fundamentally at odds with the decisions of this Court.

A. The Decision Below Focuses on the Status of Respondent Rather than the Function He Performed.

As this Court has stressed, official immunity "is not grounded in any special 'esteem for those who perform these functions [protected by immunity], and certainly not from a desire to shield abuses of office.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). To the contrary, respect for the rule of law demands that "all individuals, whatever their position in government, are subject to federal law." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Forrester v. White*, 484 U.S. 219, 223 (1988) (acknowledging the "undeniable tension between official immunities and the ideal of the rule of law"). Accordingly, under the decisions of this Court, official immunity is predicated upon the public's interest in protecting the proper functioning of government. *See, e.g., Burns*, 500 U.S. at 494 (noting that absolute prosecutorial immunity is "designed to free the judicial process from the harassment and intimidation associated with litigation") (citation omitted). In short, official immunity is "justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Forrester*, 484 U.S. at 227.

In keeping with these bedrock principles, this Court has "applied a functional approach" to immunity that "looks to the function performed, not the identity of the actor who performed it." *Forrester*, 484 U.S. at 229; *see also Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."). Thus, while the needs of the judicial process require that prosecutors enjoy absolute immunity while performing advocatory functions that are intimately related to that process, *see Imbler v Pachtman*, 424 U.S. 409, 420-31 (1976), they do not justify affording prosecutors absolute immunity when they act as complaining witnesses or engage in investigatory functions removed from the judicial process. *See Kalina*, 522 U.S. at 129-30; *Buckley*, 509 U.S. at 272-76. Moreover, this Court has consistently refused to afford absolute immunity to non-advocatory functions performed by prosecutors simply because they are related to the prosecutor's advocatory functions. *See Kalina*, 522 U.S. at 509-10; *Buckley*, 509 U.S. at 275-76; *Burns*, 500 U.S. at 494; *see also Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir. 1995) ("[T]he prosecutorial nature of an act does not spread backwards like an inkblot, immunizing everything it touches.").

The decision below disregards the functional approach that this Court has taken to official immunity and the principles underlying it. The decision did not afford respondent absolute immunity based upon the function he was performing when engaged in the misconduct alleged by petitioner, which the prior panel properly found was not advocatory in nature. App. 86a-88a. Instead, the decision below found that respondent enjoyed absolute immunity from any claim for causing a prosecution to be brought simply because he was a prosecutor. As the decision acknowledged, under its rationale "the only official who could not be held liable for malicious or retaliatory prosecution is the prosecutor." App. 7a n.2. This position is repugnant to the rule-of-law principles that underlie this

Court's official immunity decisions because it affords prosecutors absolute immunity based not upon the function that they perform in the judicial process, but upon their status as prosecutors.

Indeed, the decision below creates the very disparity that the functional approach to official immunity was designed to eliminate. As this Court has admonished, "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Buckley*, 509 U.S. at 273 (quotation omitted); *see also id.* at 276 ("When the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same."). The decision below, however, affords respondent absolute immunity from claims for malicious prosecution arising out of investigatory misconduct in which respondent engaged side-by-side with postal inspectors, even though the postal inspectors enjoy only a qualified immunity (which has been overcome in this case) against such claims. Notably absent from the decision below is any attempt to reconcile this result either with this Court's admonition or with the rule-of-law concerns that underlie it.

B. The Decision Below Disregards the Restrictions this Court Has Imposed upon Absolute Immunity.

In addition to ignoring the principles underlying this Court's official immunity decisions, the decision below also ignores the restrictions this Court has imposed upon absolute immunity. This Court has been "quite sparing in [its] recognition of absolute immunity and ha[s] refused to extend it any further than its justification[s] would warrant." *Burns*, 500 U.S. at 486-87 (quotations omitted); *see also Butz*, 438 U.S. at 507 (noting that absolute immunity is available only in "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business"). In particular, this Court has required both a common-law

tradition supporting application of absolute immunity and a showing that such immunity is necessary to protect the judicial process or any other governmental function. *See, e.g., Tower v. Glover*, 467 U.S. 914, 920-21 (1984). The decision below ignores both requirements.

1. The Absolute Immunity Afforded Respondent Lacks Any Common-Law Pedigree.

The scope of official immunity in actions against federal officials under the Constitution is the same as that enjoyed by state officials under 42 U.S.C. § 1983. *See, e.g., Crawford-El*, 523 U.S. at 587. On its face, however, Section 1983 "admits of no defense of official immunity." *Buckley*, 509 U.S. at 268. Accordingly, while this Court has long recognized immunities "well grounded in history and reason," which Congress presumably would not have eliminated silently, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), it has refused to recognize any immunity unless the official claiming that immunity was "accorded immunity from tort actions at common law when [Section 1983] was enacted in 1871." *Tower*, 467 U.S. at 920-23.

As Justice Scalia has observed, "there generally was no such thing as the modern public prosecutor" in 1871 when Section 1983's statutory predecessor was enacted. *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). Accordingly, while *Imbler* noted that beginning in 1896 some (but not all) courts began to afford prosecutors absolute immunity against malicious prosecution claims, *see Imbler*, 424 U.S. at 421-22 & n.19; *but see Burns*, 500 U.S. at 500-01 (Scalia, J., concurring in the judgment in part and dissenting in part), this Court looked to the well-established common-law tradition of affording absolute immunity to judges, jurors, and others performing roles critical to the judicial process when it recognized an absolute immunity for prosecutors. *Imbler*, 424 U.S. at 422-24 & n.20, 431. Consequently, while this Court has afforded absolute immunity to prosecutors "in initiating a prosecution

and in presenting the State's case" and in engaging in other conduct "intimately associated with the judicial phase of the criminal process," *id.* at 430, it has consistently refused to extend that immunity to conduct less closely associated with the judicial process. *See Kalina*, 522 U.S. at 129-30 (testimony in support of application for arrest warrant); *Buckley*, 509 U.S. at 272-76 (fabrication of evidence prior to establishment of probable cause); *id.* at 276-78 (statements at press conference); *Burns*, 500 U.S. at 492-96 (provision of legal advice to police).

The decision below does not—and cannot—point to any common-law antecedent for the absolute immunity it affords to respondent. As this Court recognized in *Buckley*, there is no common-law tradition of affording prosecutors absolute immunity against claims based upon investigatory misconduct. *See Buckley*, 509 U.S. at 275. Moreover, while "complaining witnesses"—that is, private individuals initiating criminal prosecutions—enjoyed a form of immunity from suit at common law, that immunity was qualified rather than absolute. *See Kalina*, 522 U.S. at 132-33 (Scalia, J., concurring); *see also Malley*, 475 U.S. at 340 ("[C]omplaining witnesses were not absolutely immune at common law.").

Nor is the decision below saved by the fact that petitioner did not cite "cases in which a prosecutor has been held liable for malicious or retaliatory prosecution." App. 7a. As this Court has "consistently emphasized," it is the official seeking absolute immunity who "bears the burden of showing that such immunity is justified for the function in question." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 n.4 (1993) (quotation omitted). As a consequence, contrary to the suggestion below, "if application of the principle [of prosecutorial immunity] is unclear, the *defendant* simply loses." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) (emphasis added). Thus, the decision below fails the threshold test for absolute immunity.

2. The Absolute Immunity Afforded Respondent Is Unnecessary and Unjustified.

The decision below also fails the ultimate test for absolute immunity because the absolute immunity it would afford to respondent and all other prosecutors is unnecessary and unjustified.

As noted above, official immunity demands a balancing of evils. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). On the one hand, suits against public officials impose costs upon those officials personally and upon society as a whole in the form of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. In addition, fear of personal liability can "unduly inhibit officials in the discharge of their duties" and thereby undermine governmental processes. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *see Harlow*, 457 U.S. at 807, 810-11.

On the other hand, suits against public officials also serve important interests. They can provide victims of official misconduct with compensation and vindicate their rights. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994). Indeed, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814 (citations omitted); *see also Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing."). Suits against public officials also help to "deter[ ] public officials' unlawful actions." *Elder*, 510 U.S. at 515; *accord Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) ("[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate" by the threat of personal liability.) (quotation omitted). And, finally, such suits vindicate the rule of law by ensuring that "all

individuals, whatever their position in government, are subject to federal law." *Butz*, 438 U.S. at 506.

Absolute immunity for public officials comes at an especially great cost because it sacrifices all the benefits of suits against public officials in order to protect against their costs. By contrast, qualified immunity attempts to accommodate the public's conflicting interests in compensating injured citizens and protecting public officials. Qualified immunity shields government officials performing discretionary functions from liability whenever "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. This standard "ensure[s] that federal officials are not harassed by frivolous lawsuits," *Butz*, 438 U.S. at 508, and it "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. At the same time, however, the qualified immunity standard protects the "public interest in deterrence of unlawful conduct and in compensation of victims" by permitting claims that are based upon objectively unreasonable conduct to proceed. *Harlow*, 457 U.S. at 819.

Accordingly, the decisions of this Court "make plain that qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. In other words, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties," *Burns*, 500 U.S. at 486-87, and an official claiming absolute immunity is required to make the "most convincing showing that the immunity is necessary" to protect the function in question. *Imbler*, 424 U.S. at 434 (White, J., concurring); *see also Butz*, 438 U.S. at 507 (noting that absolute immunity is available only in "those exceptional situations where it is demonstrated that absolute immunity is essential to the public business").

The decision below did not show that its newly recognized theory of absolute immunity was desirable, much less necessary

to serve some interest of the public. Nor did respondent attempt to make such a showing. This is not surprising: the considerations that motivated this Court to hold prosecutors absolutely immune from claims based upon the initiation of a prosecution and the presentation of evidence are inapplicable here.

In *Imbler*, this Court found that cloaking a prosecutor's performance of advocatory functions with absolute immunity was justified by three considerations. First, suits based on the performance of such functions "could be expected with some frequency" because criminal prosecutions generate deep resentment and because such claims are easily brought in the wake of an unsuccessful prosecution. *Imbler*, 424 U.S. at 425. Second, lawsuits based upon inherently complex and uncertain matters such as "the propriety of a closing argument . . . would pose substantial danger of liability even to the honest prosecutor." *Id.* Third, fear of lawsuits based on the performance of advocatory functions "could have an adverse effect upon the functioning of the criminal justice system" by discouraging prosecutors from presenting relevant evidence to the jury and by discouraging judges from rendering post-trial decisions that "might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 426-27.

These considerations are not, however, applicable to claims that prosecutors have coerced and intimidated witnesses into providing misleading testimony before the grand jury. First, such claims do not pose any special danger to prosecutors. Claims based upon pretrial, investigatory misconduct are not likely to be brought frequently because "a suspect or defendant is not likely to be as aware of a prosecutor's role in [pretrial, investigatory conduct] as a prosecutor's role in initiating and conducting a prosecution." *Burns*, 500 U.S. at 494; *accord Mitchell*, 472 U.S. at 522. Second, there is no reason to think that prosecutors will encounter any special difficulty in

defending against claims based upon intimidating and coercing witnesses because police officers are routinely subjected to such claims. Finally, and most fundamentally, suits based upon a prosecutor's pre-trial, investigatory misconduct do not carry with them any appreciable danger to the judicial process for the simple reason that such conduct is not closely associated with the process. *See Burns*, 500 U.S. at 494.

Indeed, the decision below makes no sense as a matter of policy. First, by affording prosecutors absolute immunity against malicious prosecution claims based upon investigatory conduct normally performed by law enforcement officers, the decision encourages prosecutors to engage in dubious investigatory conduct. Second, as this Court has recognized, a rule that immunizes investigatory misconduct because of its connection with the eventual prosecution of a defendant may encourage a prosecutor who has engaged in such misconduct to try and "shield himself from liability for any constitutional wrongs against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276. In short, even on purely policy grounds, the decision below is indefensible.

C. The Decision Below Ignores this Court's Instructions in *Crawford-El.*

The decision below also conflicts with this Court's decision two years ago in *Crawford-El.* In that case, this Court reversed an attempt by the court below to impose a new clear-and-convincing evidence standard on *Bivens* claims predicated on allegations of unconstitutional motive. *See Crawford-El*, 523 U.S. at 582. This Court held that imposition of this new burden of proof "stray[ed] far from the traditional limits on judicial authority." *Id.* at 594. "In the past," this Court reminded the D.C. Circuit, "we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense." *Id.* at 595; *see also Malley*, 475 U.S. at 342 ("We reemphasize that our role is to

interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.").

Ignoring this admonition, the decision below creates a new set of substantive rules limiting the ability of *Bivens* plaintiffs to recover against federal officials. Just as in *Crawford-El* the D.C. Circuit imposed an "unprecedented change" in the burden of proof that "lack[ed] any common law pedigree," *Crawford-El*, 523 U.S. at 595, in the decision below that same court created a new form of prosecutorial immunity that has no common-law antecedent. Indeed, while the court of appeals in *Crawford-El* attempted to justify the special rule that it imposed on policy grounds, *see* 93 F.3d at 821-23 (opinion of Williams, J.), this time the Court offered no policy justification whatsoever.

The decision below also ignores this Court's instruction in *Crawford-El* that a plaintiff who "survives the initial hurdle" of a motion to dismiss based upon immunity "ordinarily will be entitled to some discovery." 523 U.S. at 596. Petitioner's retaliatory prosecution claim against respondent cleared that hurdle five years ago when the first panel of the court of appeals held that respondent's coercion of William Spartin and the improper disclosure of grand jury material was not advocatory and that qualified immunity did not bar petitioner's retaliatory prosecution claim. App. 86a-88a. Accordingly, under this Court's decision in *Crawford-El*, petitioner should have been permitted to conduct discovery on his claim against respondent. Nevertheless, the decision below affirmed the district court's denial of discovery in the face of the Rule 56(f) affidavit submitted by petitioner without any mention of this Court's instructions in *Crawford-El*. App. 8a n.3.

The fact that respondent was permitted to file three dispositive motions prior to discovery creates the appearance that the lower court is unwilling to consider even meritorious claims against prosecutors, an impression that is heightened by the discovery that petitioner has been able to conduct against

the postal inspectors who worked under respondent's supervision. That discovery has not only confirmed that respondent participated extensively in investigative activities, including the planned coercion of William Spartin and the improper disclosures of grand jury testimony; it has also revealed several "smoking guns." For example, discovery has shown that respondent received a memorandum from the postal inspectors listing the fact that the company "funded a media and political campaign to discredit USPS management and cause financial harm to USPS" as the first reason for indicting it . App. 127a-30a. Similarly, another document lists petitioner's efforts to "undermine the [USPS] competitive testing program via the media and Congress" as one of the details of his supposed offense. App. 131a-33a. As a consequence, it is now clear that petitioner has a substantial and meritorious claim of retaliation in response to the exercise of his First Amendment rights, which the decision below has prevented him from pursuing based upon an unprecedented and unjustified expansion of the absolute immunity afforded prosecutors.

III. THIS CASE RAISES AN IMPORTANT AND FUNDAMENTAL ISSUE WARRANTING REVIEW BY THIS COURT.

As the "extensive attention" this Court has devoted to questions of official immunity attests, Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and the Federal System* 1124 (4th ed. 1996), this case touches upon an inherently important subject. Official immunity balances the public's conflicting interests in protecting public servants from unfounded litigation, in vindicating the rights of individual citizens harmed by official misconduct, and in maintaining the principle of the rule of law. *See supra* pp. 20 -23. It should come as no surprise that over the last twenty years this Court has reviewed more than two dozen cases relating to official

immunity,[4] often in the absence of any asserted conflict among the lower courts over those questions.[5]

This case is also important because it casts into doubt the commitment of the court of appeals in which the federal government sits to the principle of the rule of law. Although petitioner has alleged a serious abuse of power—and supported it with substantial evidence of intentional, unconstitutional misconduct—the panel below refused even to consider his

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[4] *See Wilson v. Layne*, 526 U.S. 603 (1999); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Crawford-El v. Britton*, 523 U.S. 574; *Kalina v. Fletcher*, 522 U.S. 118; *Richardson v. McKnight*, 521 U.S. 399 (1997); *Clinton v. Jones*, 520 U.S. 681 (1997); *United States v. Lanier*, 520 U.S. 259 (1997); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995); *Elder v. Holloway*, 510 U.S. 510; *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429; *Buckley v. Fitzsimmons*, 509 U.S. 259; *Hunter v. Bryant*, 502 U.S. 224 (1991); *Mireles v. Waco*, 502 U.S. 9 (1991); *Burns v. Reed*, 500 U.S. 478; *Siegert v. Gilley*, 500 U.S. 226 (1991); *Westfall v. Erwin*, 484 U.S. 292 (1988); *Forrester v. White*, 484 U.S. 219; *Anderson v. Creighton*, 483 U.S. 635; *Malley v. Briggs*, 475 U.S. 335; *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Mitchell v. Forsyth*, 472 U.S. 511; *Pulliam v. Allen*, 466 U.S. 522 (1984); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *Tower v. Glover*, 467 U.S. 914; *Briscoe v. LaHue*, 460 U.S. 325; *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800; *Gomez v. Toledo*, 446 U.S. 635.

[5] *See* Petition for Certiorari, *Clinton v. Jones*, No. 95-1853, at 9-14 (U.S. May 15, 1996); Petition for Certiorari, *Elder v. Holloway*, No. 92-8579, at 5-7 (U.S. Apr. 19, 1993); Petition for Certiorari, *Siegert v. Gilley*, No. 90-96, at 22-24 (U.S. July 13, 1990); Petition for Certiorari, *Hutchinson v. Proxmire*, No. 78-680, at 12-17, 24-25 (U.S. Oct. 20, 1978); Petition for Certiorari, *Butz v. Economou*, No. 76-709, at 7-20 (U.S. Nov. 19, 1976); Petition for Certiorari, *McFarlin v. Sparkman*, No. 76-1750, at 7-15 (U.S. June 8, 1977), *cert. granted sub nom. Stump v. Sparkman*, 434 U.S. 815 (1977); *see also* Petition for Certiorari, *Hunter v. Bryant*, No. 90-1440, at 10-24 (U.S. Mar. 12, 1991) (asserting circuit split on issue unrelated to official immunity); Petition for Certiorari, *Eastland v. United States Servicemen's Fund*, No. 73-1923, at 11-19 (U.S. Dec. 6, 1974) (asserting intracircuit conflict).

claim on its merits based upon a terse and arbitrary extension of the doctrine of absolute prosecutorial immunity that conflicts with multiple decisions of this Court. As a consequence, the decision below suggests that the lower court is unwilling to enforce the announced limitations on prosecutors and require them to abide by the laws they enforce. Moreover, this impression is heightened by the fact that, nearly thirty years after *Bivens* became the law of the land, one member of the panel below publicly called for overruling the decision altogether. *See Crawford-El*, 93 F.3d at 829-32 (Silberman, J., concurring).

Nor is the problem limited to the court below. Although *Bivens* held that injured citizens may seek damages in federal courts from federal officers for violations of their constitutional rights, this promise remains a largely illusory remedy. According to recent estimates, plaintiffs prevail in less than one percent of the recent *Bivens* cases filed. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under* Bivens, 88 Geo. L.J. 65, 66 (1999) (noting that "plaintiffs obtain a judgment awarding them damages in a fraction of one percent of *Bivens* cases and obtain a monetary settlement in less than one percent of such cases"); *Crawford-El v. Britton*, 93 F.3d at 838 (Silberman, J., concurring) (noting that, as of 1985, judgments had been paid in only 4 out 12,000 *Bivens* suits). Furthermore, as one commentator has observed, there appears to be an "almost complete unavailability of civil redress against a prosecutor." Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L.Q. 713, 818 (1999). Thus, the decision below exacerbates concerns about the practical availability of relief under *Bivens* and the public's concomitant need for reassurance the doctrine of official immunity will be enforced in an even-handed fashion that gives plaintiffs with meritorious claims against prosecutors their day in court.

Moreover, this case presents an ideal vehicle in which to provide that reassurance. This is not a prisoner case in which a minor claim has been made based upon tenuous evidence. Petitioner has alleged egregious misconduct violating fundamental rights and supported his allegations with substantial evidence. Moreover, this case has already been through two appeals, which have narrowed and focused the legal issues. Indeed, the question before this Court is really a simple one: is this Court willing to enforce its decision in *Buckley* and other cases imposing limits on official immunity? This question warrants the attention of this Court. Indeed, in light of the clear conflict between the decision below and the decisions of this Court, this is the rare case in which it is appropriate not only to grant certiorari, but also to summarily reverse the decision below under Rule 16.1 of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision below summarily reversed.

Respectfully submitted,

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